

1994

# The State of Utah v. Tracy Alan Candelario : Reply Brief

Utah Court of Appeals

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UTAH  
DC

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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THE STATE OF UTAH,	:	JAN DOC.
Plaintiff/Appellee,	:	
v.	:	
TRACY ALAN CANDELARIO,	:	Case No. 940500-CA
Defendant/Appellant.	:	Priority No. 2

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**REPLY BRIEF OF APPELLANT**

Appeal from a sentence enhancement imposed pursuant to Utah Code Ann. § 76-3-203 (1995) upon judgment and conviction for one count of robbery, a second degree felony, in violation of Utah Code Ann. § 76-6-301 (1995), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Timothy R. Hanson, Judge, presiding.

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**FILED**

AUG 30 1995

**COURT OF**

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**STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS**

The following are set forth in addendum A:

U.S. Const. amend. V  
U.S. Const. amend. XIV, § 1  
Utah Const. art. I, § 7  
Utah Code Ann. § 76-3-203 (1995)

**ARGUMENT**

POINT I. MR. CANDELARIO HAS NOT WAIVED HIS CLAIM THAT THE FIREARM ENHANCEMENT DOES NOT APPLY WHERE THERE IS ONLY A VERBAL REPRESENTATION OF A FIREARM, RATHER THAN A PHYSICAL REPRESENTATION.

(Responding to State's brief at Point A., pp. 4-7)

The State asserts that Mr. Candelario has waived his claim as a result of counsel's statement that imposition of the enhancement was discretionary, rather than illegal. While counsel's articulation may have been inartful, there is no question that the trial court understand the thrust of her argument, and actually ruled on the applicability of the enhancement.

The trial court stated:

THE COURT: Sounds to me like an ideal question for one of the appellate courts to consider. I can't see a dime's worth of difference if you're the person standing there being robbed where a person represents they have a firearm, or whether or not it's displayed,

they believe you, the fear is still there. I suppose there's a lot of aggravated robberies that don't result in a shooting. We all know how I feel about firearms. You use a firearm, you get an enhancement, or if you represent you have one. If that's wrong, the appellate courts can figure a way to get around the statute. But that doesn't change my mind about it. The fact that there wasn't one may have some impact on whether or not this sentence should run consecutively . . .

R. 51.

The issue has been properly preserved. The trial court understood that defendant's position was that the enhancement could not be based solely on a verbal representation. The trial court recognized the issue, noted that it "sounds . . . like an ideal question for one of the appellate courts to consider," and ruled that the enhancement was in fact applicable based solely on a verbal representation.

The purposes behind the waiver rule are well established:

The requirement of a specific objection on the record ensures that the trial court will understand the basis of the objections and have an opportunity to correct any errors before the case goes to the jury. E.g., State v. Kazda, 545 P.2d 190, 192-3 (Utah 1976). This requirement also assures that the appellate court will have a record of the grounds asserted below. If, however, the record on appeal fails to demonstrate that the trial court has been given a fair opportunity to avoid an error, we usually will not consider any claim based on that error. E.g., Franklin Fin. v. New Empire Dev. Co., 659 P.2d 1040, 1045 (Utah 1983).

Hansen v. Stewart, 761 P.2d 14, 16 (Utah 1988).

[I]n order to preserve a plea of error, the alleged error must have been raised seasonably by counsel to the trial court. The purpose of this rule is to allow the trial court to correct any error, if error there be.

Utah County v. Brown, 672 P.2d 83, 85 (Utah 1983) (footnote omitted).

A timely and recorded objection to the trial court's failure to comply with a request at trial puts the judge on notice of the asserted error and allows the opportunity for correction at that time in the course of the proceeding. . . . There is no support for appellant's claim that the trial judge knew the action he was requested to take but refused to take it.

Broberg v. Hess, 782 P.2d 198, 201 (Utah App. 1989).

In Utah, matters not raised in the pleadings nor put in issue at the trial may not be raised for the first time on appeal. Bundy v. Century Equip. Co., 692 P.2d 754, 758 (Utah 1984); Franklin Fin. v. New Empire Dev. Co., 659 P.2d 1040, 1044 (Utah 1983). A matter is sufficiently raised if it has been submitted to the trial court and the trial court has had an opportunity to make findings of fact or law. See Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 672 (Utah 1982).

James v. Preston, 746 P.2d 799, 801 (Utah App. 1987). See also State v. Johnson, 856 P.2d 1064, 1067 (Utah 1993) ("A defendant is obliged to seek a trial court's ruling on an issue before the issue can be raised in an appellate court."); Lamkin v. Lynch, 600 P.2d 530, 533 (Utah 1979) ("This point is raised for the first time on appeal and hence was not ruled upon by the trial court."); Wurst v. Dep't of Employment Sec., 818 P.2d 1036, 1039 (Utah App. 1991) (issue sufficiently raised where mentioned in letter to department which served as appeal of A.L.J.'s decision).

In this case, the trial court was apprised of the asserted error, given an opportunity to rule, and did in fact rule. No waiver has occurred.

Mr. Candelario relies on his opening brief in response to the remainder of the State's brief.

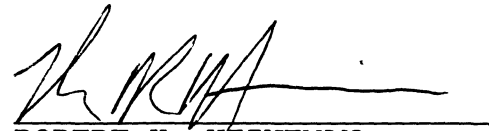


CONCLUSION

Based on the foregoing, Mr. Candelario's appeal should be addressed on the merits. The consecutive one year firearm enhancement portion of his sentence should be vacated.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of August, 1995.

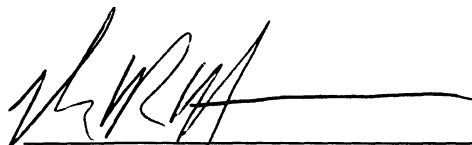
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CERTIFICATE OF DELIVERY

I, Robert K. Heineman, hereby certify that I have caused eight copies of the foregoing to be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 30<sup>th</sup> day of August, 1995.

  
\_\_\_\_\_  
Robert K. Heineman

DELIVERED/MAILED this \_\_\_\_\_ day of August, 1995.

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## **ADDENDUM A**

Statutes, rules, and constitutional provisions.

The fifth amendment to the United States Constitution provides:

**[Criminal actions - Provisions concerning - Due process of law and just compensation clauses.]**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The fourteenth amendment to the United States Constitution, section 1 provides:

**Section 1. [Citizenship -- Due process of law -- Equal protection.]**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, section 7 of the Utah Constitution provides:

**Sec. 7. [Due process of law.]**

No person shall be deprived of life, liberty or property, without due process of law.

Utah Code Ann. § 76-3-203 (1995) provided:

**76-3-203. Felony conviction - Indeterminate term of imprisonment - Increase of sentence if firearm used.**

A person who has been convicted of a felony may be sentenced to imprisonment for an indeterminate term as follows:

. . . .

(2) In the case of a felony of the second degree, for a term at not less than one year nor more than 15 years but if the trier of fact finds a firearm or a facsimile or the representation of a firearm was used in the commission or furtherance of the felony, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently;

. . . .